Filed 3/30/10 In re Richard B. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re RICHARD B., a Person Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. CASSANDRA W., Defendant and Appellant.	G042507 (Super. Ct. No. DP015788) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Douglas Hatchimonji, Judge. Affirmed.

Diana W. Prince, under appointment by the Court of Appeal, for Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, and Karen L. Christensen, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minor.

* * *

Cassandra W. appeals from the juvenile court's order terminating her parental rights to her now 12-year-old son, Richard B. (Welf. & Inst. Code, § 366.26; all further statutory references are to this code unless otherwise stated.) She contends there was inadequate compliance with the Indian Child Welfare Act (ICWA; 25 U.S.C., § 1901 et seq.) and that the court erred in finding that the benefit exception under section 366.26, subdivision (c)(1)(B)(i) did not apply. We disagree and affirm.

FACTS

In August 2007, police found the then 8-year-old child and his 4-year-old half sister by themselves on a busy street at 10:30 p.m. and his 2-year-old half sister home alone sleeping next to an approximately 6-inch knife and several open bottles of beer. The child told police mother had left him to care for his siblings while she visited her boyfriend and that she did that routinely. At the time, the child, who had been living with his paternal grandparents since February by mutual agreement because mother could not handle caring for all three children, was on a temporary two or three week visit with mother.

The children were detained and all were placed with the child's paternal grandparents. Mother received weekly monitored visitation but canceled one visit and stayed only 45 minutes on another. The child reported he was "happy" and wanted to live with his caregivers. Although his visits with mother were "fine," it "didn't matter" to him if they were longer or shorter.

The court sustained the dependency petition and ordered reunification services. At mother's request, visitation was modified from weekly to once every other week because of the distance and her finances. Although she called several times a week, mother did not visit the child from late December to March 2008 due to difficulty in getting to San Diego. She began visiting again when transportation passes were provided and requested weekly visitation. Mother was affectionate during visits and the child was receptive to her affection, stating "he enjoys spending time . . . and . . . playing with her." During this period the child had behavioral problems at school, which his teacher attributed "to the uncertainty of his family situation."

At the 6-month review hearing, the court found continued services were necessary and ordered weekly 4-hour visits. The child reportedly "enjoys his visits with . . . mother, and . . . they have fun together. [But] . . . he does not want to talk on the phone to her, and does not express that he misses her." His behavioral problems at school increased and his teacher objected to him "having fun visits with his parents during the weekends when his behavior is bad during the week." Mother disagreed with not allowing the child to have fun during visits "because the child was already being disciplined by the caregiver[s] and did not need to be disciplined by her as well." Nevertheless, she told him it was important to behave well and focus on school. The caregivers believed the child was misbehaving because he thought he would be "going home to . . . mother" and felt "in limbo about his living situation."

By the time of the 12-month review, the child had improved two grade levels after being placed with the caregivers but continued to have violent outbursts at school. At one point, he stated he was unhappy in his placement because his caregivers "yell at [him] all the time" and required him to go to bed by 8:45 p.m. whereas his mother would allow him to stay up as late as he wanted and never yelled at him.

During visits, mother "struggle[d] with consistently disciplining the child . . . . [O]n one occasion, the child actually struck . . . mother and [she] did nothing in

response." When the child misbehaved another time, mother had to be prompted to redirect or set limits for him. According to the caretaker, "mother and child interact more like siblings than mother and child. . . . [T]hey have a lot of fun together, but . . . mother does not discipline the child." At the 18-month review hearing, the court terminated reunification services and set a permanency hearing.

The child's behavioral problems improved after receiving medication for a hyperactivity disorder, and his therapist opined he was "becoming increasingly relaxed now that he believes he will be staying permanently in his placement." The child indicated his caregivers were "responsible for providing his basic needs and ensuring his health and safety," and that he did not really know what role mother played in his life "because she's not really around." The caretakers wished to adopt him and he was "fine with [that]."

According to SSA, although mother had maintained consistent contact with the child, she did not "fill a parental role in his life." She did not provide his basic needs and the child did not look to her to do so. Nor did she participate in his education or mental health care. At visits she does not readily redirect the child, requiring monitors to step in. SSA believed "termination of parental rights would not be detrimental to the child as it would allow him to have a stable, permanent home, which will promote his long-term health and well[-]being."

The court denied mother's section 388 petition requesting further reunification services and increased visitation. At the permanency hearing, no witnesses were called and mother's counsel "submit[ed] the matter . . . on the admissible evidence and object[ed] to the recommendation." The court terminated her parental rights after finding the child likely to be adopted and none of the exceptions under section 366.26, subdivision (c)(1)(B) applicable. Additional facts are set out in the discussion.

1. ICWA

At the detention hearing, the court asked mother if she had any American Indian ancestry. Mother responded, "We have it in our blood but we're not registered." Her family and in particular her "great-grandma is from Missouri and she has Indian." She believed Cherokee, but was unsure. She said her grandmother might have more information but she did not have her contact information with her. Mother agreed to provide her grandmother's information to SSA and the court asked SSA to notify the Cherokee tribes and Bureau of Indian Affairs (BIA). After a telephone interview with mother, SSA sent notices to the BIA and various Cherokee tribes.

The notices listed mother's name, address, birth date and place; the maternal grandmother's name, birth date and place; and the maternal grandfather's name, birth month and day. The maternal grandparent's current and former addresses were marked as "unknown." Regarding the maternal great-grandparents, only their names were provided; their current and former addresses were "N/A" and their birth date and place were "unknown." No American Indian ancestry was identified on the paternal side but Cherokee was noted as the tribe for mother, the maternal grandmother, and the maternal great-grandmother. The additional information attachment indicated the information in the form was obtained in a telephone interview with mother, who "reported possible Cherokee ancestry," and that SSA "has provided all known information and no other relevant information is available at this time."

Responses from the BIA and Cherokee tribes indicated the absence of Indian heritage. Mother stipulated to a finding that ICWA did not apply.

Mother now contends the notices were insufficient because SSA failed to contact the maternal grandmother, who has since passed away, or the maternal great-grandmother and never explained why it did not. We disagree.

To enable a tribe to determine whether a dependent child has Indian heritage, "'it is necessary to provide as much information as is known on the . . . child's

direct lineal ancestors.' [Citation.]" (*In re Karla C.* (2003) 113 Cal.App.4th 166, 175.) Thus, "'[t]he notice must include: *if known*, (1) the Indian child's name, birthplace, and birth date; (2) the name of the tribe in which the Indian child is enrolled or may be eligible for enrollment; (3) names and addresses of the child's parents, grandparents, great grandparents, and other identifying information; and (4) a copy of the dependency petition.' [Citation.] 'It is essential to provide the Indian tribe with all available information about the child's ancestors, especially the ones with the alleged Indian heritage. [Citation.] Notice . . . must include available information about the maternal and paternal grandparents and great-grandparents, including maiden, married and former names or aliases; birthdates; place of birth and death; current and former addresses; tribal enrollment numbers; and other identifying data.' [Citations.]" (*In re K.M.* (2009) 172 Cal.App.4th 115, 119, italics added.)

Here, SSA gave notice to the tribe identified by mother and provided all the information it was able to obtain from her. The notices marked the current and former addresses of the maternal grandmother and the great-grandmother as "unknown" and "N/A" respectively. From this, it is reasonable to conclude mother was unable to supply contact information for them. Mother provides no authority requiring SSA to locate relatives for whom she had no known address. (See *In re K.M.*, *supra*, 172 Cal.App.4th at pp. 119-120 [inquiry adequate where contact information not provided despite inquiry from social services agency].)

2. Benefit Exception

Mother asserts the court erred in terminating her parental rights because she satisfied the "benefit exception" of section 366.26, subdivision (c)(1)(B)(i). She acknowledges she "did not specifically argue . . . the parental bond exception . . . applies," but asserts she "has standing to raise the issue" because she "objected to the

termination of her parental rights, and the juvenile court . . . found none of the exceptions to section 366.26 applie[d] . . . ." We disagree.

Her failure to claim the exception in the trial court forfeits the contention on appeal. (*In re Rachel M*. (2003) 113 Cal.App.4th 1289, 1295.) Mother had the burden to assert the exception and prove it. (*Ibid.*) Her attorney's general objection to the termination of parental rights on her behalf does not constitute an assertion that the benefit exception applied. The failure to raise the issue deprived the juvenile court of the ability to consider in the first instance the evidence and arguments mother now makes on appeal.

Even if mother had not forfeited the exception, she failed to establish it applies. Once the court decides under section 366.26 a child is likely to be adopted, it "shall terminate parental rights and order the child placed for adoption" (§ 366.26, subd. (c)(1)) unless it "determin[es] that termination would be detrimental to the child due to" one of the statutory exceptions. (§ 366.26, subd. (c)(1)(B).) One exception is where a "parent[] ha[s] maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i); see also *In re Jasmine D*. (2007) 78 Cal.App.4th 1339, 1350.) Mother bears the burden of proving both these factors and that "she occupies a 'parental role' in the child's life. [Citations.]" (*In re Derek W*. (1999) 73 Cal.App.4th 823, 827.)

Here, mother did not visit the child for three months, from late December to March 2008. But even assuming mother maintained regular visitation after that, she failed to meet her burden of showing a beneficial relationship.

"A beneficial relationship is one that 'promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.' [Citation.] The existence of this relationship is determined by '[t]he age of the child, the portion of the child's life spent in the parent's custody, the "positive" or "negative" effect of interaction between parent and child, and the child's

particular needs . . . . [Citation.]'" (*In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1206.) Where the parent has continued to regularly visit and contact the child, and the child has maintained or developed a significant, positive, emotional attachment to the parent, "the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

"A parent must show more than frequent and loving contact or pleasant visits. [Citation.] . . . . The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment between child and parent. [Citations.]" (*In re Mary G.* (2007) 151 Cal.App.4th 184, 207, fn. omitted.) "In other words, for the exception to apply, the emotional attachment between the child and parent must be that of parent and child rather than one of being a friendly visitor or friendly nonparent relative, such as an aunt. [Citation.]" (*In re Angel B.* (2002) 97 Cal.App.4th 454, 468.) If supported by substantial evidence, we will not disturb the court's determination that a beneficial relationship does not exist. (*In re Autumn H., supra,* 27 Cal.App.4th at p. 576.)

The record supports the juvenile court's rejection of the parent-child benefit exception. Mother did not "fill a parental role in [the child's] life," provide his basic needs, or participate in his education or mental health care. In fact, the child did not know what role mother played in his life "because she's not really around." Although they had fun together, mother constantly struggled with disciplining him during visits when he misbehaved and their interaction was described as "more like siblings than mother and child. . . ." To the extent the child derived some benefit from his relationship

with mother, the quality and strength of that relationship did not outweigh the benefits of adoption.

Mother argues she satisfied her burden because she "maintained consistent visitation," she and the child "were affectionate" and "enjoyed their visits," and the child "often yearned to return home to" her. But this does not show the relationship between them was anything more than that of a friendly visitor. Moreover, we must "presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order. [Citations.]" (*In re Autumn H., supra,* 27 Cal.App.4th at p. 576.) Because substantial evidence supports the court's ruling, we will not overturn it. The mere fact mother presented other evidence that may have supported a contrary result does not suffice to nullify the juvenile court's findings.

Mother cites *In re S.B.* (2008) 164 Cal.App.4th 289 for the proposition that the beneficial parental exception may apply, even in the absence of either "day-to-day contact" (*id.* at p. 299) or a "'primary attachment'" (*ibid.*). The case is inapposite. *In re S.B.* recognized the exception nevertheless requires evidence that the child would be "'greatly harmed'" by severance of the natural parent/child relationship. (*Id.* at p. 297.) The father had been the child's primary caregiver for three years and a bonding study indicated that "'because the bond between [the father] and [the child] was fairly strong, there was a potential for harm to [the child] were she to lose the parent-child relationship.'" (*Id.* at p. 296.) The social worker admitted that "there would be some detriment to [the child] parental rights [were] terminated" (*id.* at p. 295) and the juvenile court found the father and the child had "an emotionally significant relationship[]" (*id.* at p. 296). No analogous evidence exists in this case.

DISPOSITION

The order is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.